

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

11 RANDALL HARDING,) Case No. EDCV 07-1272-VAP
12 Petitioner,) EDCR 04-0082-VAP
13 v.) [Motion filed on Sept. 28,
14 UNITED STATES OF) 2007]
15 AMERICA,) ORDER DENYING MOTION TO
16 Respondent.) VACATE, SET ASIDE, OR
CORRECT SENTENCE UNDER 28
U.S.C. § 2255

17 The Court has received and considered all papers
18 filed in support of, and in opposition to, Randall
19 Harding's "Petition for Writ of Habeas Corpus Pursuant to
20 28 U.S.C. § 2255," requesting to vacate, set aside, or
21 correct his sentence ("Motion"). The Motion is
22 appropriate for resolution without oral argument.¹ For
23 the reasons set forth below, the Court DENIES the Motion.

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27 ¹Section 2255 does not require a hearing where, as
28 here, "the motion and the files and records of the case
conclusively show that the prisoner is entitled to no
relief." 28 U.S.C. § 2255.

I. BACKGROUND

A. Procedural History

3 On September 7, 2004, Petitioner Randall Harding was
4 charged in a two-count information with (1) wire fraud in
5 violation of 18 U.S.C. section 1343 and (2) money
6 laundering in violation of 18 U.S.C. section 1957. (Case
7 No. 04-CR-0082-VAP, Doc. no. 1.) On January 10, 2005,
8 Harding entered pleas of "guilty" to both counts of the
9 information. (Case No. 04-CR-0082-VAP, Doc. no. 16.) At
10 a hearing on September 25, 2006, the Court sentenced
11 Harding to a term of 51 months incarceration, a three
12 year term of supervised release, a \$200 special
13 assessment and restitution in the amount of \$1,343,700.
14 (Case No. 04-CR-0082-VAP, Doc. no. 30.) The Judgment and
15 Commitment Order was entered on October 2, 2006. (Case
16 No. 04-CR-0082-VAP, Doc. no. 31.) Harding did not appeal
17 his conviction or sentence.

19 On September 8, 2007, Harding filed a "Petition for
20 Writ of Habeas Corpus Pursuant to 28 U.S.C. § 2255"
21 ("Motion" or "Mot."), moving the Court to vacate, set
22 aside, or correct his sentence. On December 13, 2007,
23 Harding filed a "Supplemental Brief" ("Def.'s Supp.
24 Brief"). The Government filed a "Motion to Dismiss and
25 Opposition to Defendant's Motion for Relief Pursuant to
26 28 U.S.C. § 2255" ("Opp'n") on May 1, 2008, together with

1 supporting declarations and exhibits. Harding filed his
2 Traverse on July 7, 2008.

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4 **B. Factual History**

5 The two-count information alleged that Harding had
6 engaged in wire fraud and money laundering as part of a
7 scheme to defraud investors. [Declaration of Sheri Pym
8 ("Pym Decl.") Ex. A (Information, filed under seal).]
9 Harding was alleged to have solicited investments
10 totaling approximately \$1.5 million, based on false
11 representations concerning the safety and soundness of
12 the investments. (Id.)

13

14 Harding entered into a Plea Agreement with the
15 Government in which both sides agreed that sentence
16 should be imposed based on an offense level of 27, with a
17 two or three-level downward departure for acceptance of
18 responsibility. (Pym Decl. Ex. B (Plea Agreement) at ¶¶
19 11, 18.) The Government agreed to request a sentence
20 below the applicable sentencing range if it determined,
21 "in its exclusive judgment, that defendant . . . provided
22 substantial assistance to law enforcement in the
23 prosecution or investigation of another." (Id. ¶ 18(g).)
24 The Plea Agreement included the following language
25 concerning Defendant's right to seek review of his
26 sentence:

27

28

1 Defendant also gives up any right to
2 bring a post-conviction collateral attack
3 on the convictions or sentence, including
4 any order of restitution, except a post-
5 conviction collateral attack based on a
6 claim of ineffective assistance of
7 counsel, a claim of newly discovered
8 evidence, or an explicitly retroactive
9 change in the applicable Sentencing
10 Guidelines, sentencing statutes, or
11 statutes of conviction.

12 || (Id. ¶ 22.)

14 The United States Probation Office prepared a
15 presentence report, in which it calculated a sentencing
16 range under the United States Sentencing Commission
17 Sentencing Guidelines of 51 to 63 months, based on a
18 Criminal History category of I, and an Offense Level of
19 24. [Pym Decl. Ex. D (Presentence Investigation Report)
20 at 1a.] The Government recommended a sentence at the low
21 end of the range, or 51 months. [Pym Decl. Ex. E
22 (Government's Sentencing Position Paper) at 6.]

II. LEGAL STANDARD

25 Pursuant to section 2255,
26 [a] prisoner in custody under sentence of a
27 court established by Act of Congress claiming

1 the right to be released upon the ground that
2 the sentence was imposed in violation of the
3 Constitution or laws of the United States, or
4 that the court was without jurisdiction to
5 impose such sentence, or that the sentence was
6 in excess of the maximum authorized by law, or
7 is otherwise subject to collateral attack, may
8 move the court which imposed the sentence to
9 vacate, set aside or correct the sentence.

10 28 U.S.C. § 2255(a).

11

12 III. DISCUSSION

13 In his Motion, Harding requests that his sentence be
14 reduced to the term of imprisonment that would have been
15 imposed if the Court had applied a downward departure
16 under section 5K1.1 of the Sentencing Guidelines. (Mot.
17 at 1); U.S. Sentencing Guidelines Manual § 5K1.1 (2005).
18 Harding argues that the Plea Agreement he entered into
19 required the Government to move for a downward departure
20 under section 5K1.1. (Mot. at 4-5.) The Government's
21 failure to make such a motion, according to Harding,
22 constituted a breach of the Plea Agreement and requires a
23 correction to his sentence in the form of a reduction in
24 the term of incarceration. (*Id.*) Furthermore, in his
25 Supplemental Brief, Harding argues that the term of
26 supervised release imposed as part of his sentence was
27 not part of his Plea Agreement, nor was it required by
28

1 the offenses to which he pleaded guilty.² (Def.'s Supp.
2 Brief at 1.)

4 The Government argues that the Motion should be
5 denied, because Harding waived his right to bring a
6 collateral attack on his sentence. (Opp'n at 13-14.) As
7 part of the Plea Agreement he entered into, Harding gave
8 up "any right to bring a post-conviction collateral
9 attack on the convictions or sentence, including any
10 order of restitution, except a post-conviction collateral
11 attack based on a claim of ineffective assistance of
12 counsel, a claim of newly discovered evidence, or an
13 explicitly retroactive change in the applicable Sentence
14 Guidelines, sentencing statutes, or statutes of
15 conviction." (Pym Decl. Ex. B ¶ 22.) The Government
16 contends Harding's allegation that it breached the Plea
17 Agreement does not fall into any of the exceptions
18 allowing for a collateral attack. (Opp'n at 13-14.)

20 The Ninth Circuit has upheld a defendant's waiver of
21 his statutory rights, such as the right to file a motion
22 under section 2255. United States v. Abarca, 985 F.2d
23 1012, 1014 (9th Cir. 1993); United States v. Navarro-
24 Botello, 912 F.2d 318, 321 (9th Cir. 1990). "Generally,

1 courts will enforce a defendant's waiver of his right to
2 appeal if (1) the language of the waiver encompasses the
3 defendant's right to appeal on the grounds claimed on
4 appeal, and (2) the waiver is knowingly and voluntarily
5 made." United States v. Nunez, 223 F.3d 956, 958 (9th
6 Cir. 2000) (quoting United States v. Martinez, 143 F.3d
7 1266, 1270-71 (1998)). The Ninth Circuit has expressed
8 doubt, however, that a defendant can validly waive a
9 claim of ineffective assistance of counsel. United
10 States v. Jeronimo, 398 F.3d 1149, 1156 n.4 (9th Cir.
11 2005); United States v. Pruitt, 32 F.3d 431, 433 (9th
12 Cir. 1994).

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14 Here, Harding acknowledged his understanding that
15 under the Plea Agreement, he was giving up most of his
16 appeal rights, including the right to argue that his
17 "sentence was contrary to law or [that] it violated the
18 Federal Sentencing Guidelines." [Pym Decl. Ex. C
19 (Transcript of plea proceedings) at 15:13-22; 20:23-21:3;
20 30:12-21.] Harding also agreed that he was competent to
21 enter a guilty plea, that his guilty plea was voluntary,
22 and that he understood the consequences of such a plea.
23 (Id. at 23: 2-10.) Harding stated that he had discussed
24 the entire Plea Agreement with his attorney, and that no
25 promises had been made to him outside of what was
26 included in the Plea Agreement. (Id. at 9:11-10:8.)

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1 Harding does not assert that he unknowingly or
2 involuntarily waived his right to bring a section 2255
3 motion. Instead, in his Traverse, Harding attempts to
4 fashion an ineffective assistance of counsel claim by
5 arguing that such a claim "was sufficiently raised by the
6 facts alleged in the motion" and requesting liberal
7 construction of his pro se filings. (Traverse at 3.)
8 Harding concedes, however, that "a clear reading of the
9 four corners of Harding's § 2255 motion reveals no
10 specific allegation that counsel rendered ineffective
11 assistance." He also admits that he did not make an
12 ineffective assistance claim, because doing so would have
13 "created a conflict" with his counsel, who still
14 represented him at the time he filed the Motion. (Mot. at
15 2-3.)

16

17 The Court declines to construe the Motion as raising
18 a claim for ineffective assistance of counsel. Even
19 applying a liberal construction to the Motion, that
20 document does not contain any allegations concerning
21 counsel's failure to file a notice of appeal or a motion
22 for new trial, which are the grounds on which Harding
23 claims ineffective assistance in his Traverse. (Traverse
24 at 1-2.) The Court further declines to consider the
25 claim of ineffective assistance of counsel on the merits,
26 because it was raised for the first time in the Traverse.

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1 Cacoperdo v. Demosthenes, 37 F.3d 504, 507 (9th Cir.
2 1994).

3
4 The Court finds that Harding knowingly and
5 voluntarily waived his right to seek review of his
6 sentence under section 2255, and that his waiver
7 encompassed the grounds raised in his Motion.

8 Accordingly, the Court GRANTS the Government's request to
9 dismiss the Motion on the ground that Defendant waived
10 his right to raise the claims asserted therein, and
11 DENIES the Motion and DISMISSES this action.

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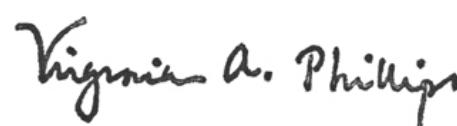
13 **IV. CONCLUSION**

14 For the foregoing reasons, the Court GRANTS the
15 Government's request to deny the Motion and DISMISSES
16 Harding's "Petition for Writ of Habeas Corpus Pursuant to
17 28 U.S.C. § 2255."

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20 Dated: August 26, 2008

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VIRGINIA A. PHILLIPS
United States District Judge

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